

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

**COMMENTS OF TELEFÓNICA, S.A.  
ON NOTICE OF PROPOSED RULEMAKING**

Telefónica, S.A. (“TEF”) hereby submits the following comments in response to the Commission’s Notice of Proposed Rulemaking in the matter of preserving the open internet and broadband industry practices.

**I- BACKGROUND**

TEF, headquartered in Spain, is one of the world’s leading integrated telecommunications operator providing fixed, mobile, broadband, data and video services to more than 260 million customers in 24 countries, with a work force of over 250,000 employees.

TEF unique profile stands from its geographical coverage, providing services in developed and developing countries, with different market positions (incumbent in some markets, new entrant in others). TEF has a strong presence in Europe, leads the Latin American telecommunications market and has the largest worldwide strategic alliance of our industry in China, with an 8% investment in China Unicom.

TEF carries out a wide range of business activities in the U.S. through a group of subsidiaries coordinated by Telefónica Internacional USA (TIUSA), which is

headquartered in Washington DC. Those activities include enterprise services for the corporate market, long distance services (Puerto Rico), on-line services through our Internet portal Terra USA and the operation and marketing from Miami of a fiber optic submarine cable surrounding Latin America.

**TEF Facts and Figures:**

- Ranked 1st international integrated telecommunications operator by customer base (258,9 million of access as of December' 08)
- Ranked 1st European telecommunications operator by market capitalisation (133,7 US\$ bn, source: Bloomberg 11.11.09)
- Ranked 1st telecommunications operator in the Dow Jones Sustainability Index
- Among the 40 largest companies in the world by market capitalisation
- Among the 100 largest companies in the world by revenues

**II- DISCUSSION**

TEF welcomes the opportunity to be involved in this debate on account of the potential impact that any form of net neutrality regulation adopted in the US may have in other countries where we are operating. We are now filing some general remarks and we will make further comments at a later stage in this process.

**A- TEF approach to Net Neutrality**

TEF is strongly linked to the evolution of the Internet, being increasingly affected by the debate on net neutrality, for the following reasons:

- the broadband market is a very significant part of TEF business (13% of total revenues in 2008 to 21% of expected revenues in 2012)

- TEF expects to obtain new sources of revenues from the development of innovative services and Internet applications (6% of total revenues expected in 2012)
- these new services and applications are being developed with different quality and bandwidth specifications, requiring an adequate network management to ensure a good quality of experience for our customers
- our clients have different profiles in their consumption habits of Internet services; they might benefit from a range of commercial offers with differentiated characteristics of quality and prices
- TEF is participating in several layers of the Internet value chain, operating as a broadband access provider, as network operator or as a content and applications provider

From this perspective, TEF articulates its vision of the regulatory debate on network neutrality around the following 3 main pillars:

**1- There is no need to set up ex ante regulation of the Internet, TEF believes that general principles suffice to safeguard and promote the open Internet**

Currently, it has not been demonstrated that there exists any major market failure that would justify the establishment of ex ante regulation of the Internet.

Regulating the Internet would imply the regulation of a complex system in continuous evolution and changing characteristics in order to solve ill-defined or hypothetical

problems; therefore, the Internet's development and service innovation would be put at risk by regulation.

The access to networks and the use of network operators resources to offer Internet services and applications must be based on commercial agreements as a result of the commercial cooperation between agents; this cooperation will strengthen and balance the participation of Internet agents in different stages of the value chain, enhancing the recovery of investments, the development of innovation and the efficiency in the use of the network. The result of such cooperation between agents includes, for example, the agreements between ASPs and network operators to distribute content through Content Delivery Networks.

## **2 - An ex post intervention model, based on a case by case approach**

Situations of lack of transparency, discriminatory or blocking practices, have to be addressed and resolved on a case-by-case basis under specific, proved and justified complaints.

## **3 - Encouraging investment and innovation**

Authorities have to preserve the appropriate degree of freedom for network and service operators to drive the development of broadband access to the Internet. Authorities are expected to prioritize a legal security framework that encourages investment, innovation and a sustainable development of the Internet.

## **B- NPRM Content**

B.1 TEF agrees with the following arguments of the FCC exposed in the NPRM:

- The importance and necessity of maintaining an open Internet. This has permitted its development and innovation and could be compromised by future regulation.
- The need for a reasonable management of Internet traffic: A proper management of networks, treating differently traffic with particular characteristics and quality requirements, is the way to prevent the congestion of the network. Traffic management must be done with transparency, without arbitrary discrimination, ensuring an efficient and responsible use of network resources and guaranteeing the customers access to every available network resources. The Internet is a network of networks, where traffic is exchanged in “thousands of handshakes” that take place by mutual agreement among the more than twenty thousand networks that comprise the Net. It’s also a global marketplace for network resources and capabilities. As this market handles ever-increasing levels of traffic, the exercise of effective network management consists, first and foremost, of cooperative efforts between carriers in the value chain to deal with challenges such as spam and congestion. We agree that consumers should be able to access any content on the Internet, and run any application and device that they choose. But, critically, this should happen without prejudicing the ability of fixed and mobile network operators to manage congestion and capacity constraints on a secure network, or the market’s ability to experiment with new ways to organize and provide services<sup>1</sup>.
- The introduction of new principles to preserve the openness of the Internet adapted to the new needs and challenges of the Internet, such as the principles of

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<sup>1</sup> Source: “Ensuring Network Stability and Consumer Confidence in Competitive Markets”, Net Confidence Coalition

transparency and non discrimination, the latter flexibly understood as a way to prevent arbitrary discrimination to obtain a competitive advantage not as a way to prevent reasonable discrimination related to network integrity or the protection of the public interest.

- The adaptation of the reasonable traffic management criteria to the characteristics and needs of the broadband networks, fixed or mobile.
- The importance of ensuring the compatibility of the managed services offered by telecom operators with the services and applications offered on the Internet.

B-2 However, for TEF the possibilities of preserving the openness of the Internet are essentially related to the degree of competition in the Internet access market and to the avoidance of abuses of dominant position in other stages of the value chain, guaranteeing therefore the freedom of choice of end users and competition in the market.

In any case, TEF questions whether Internet regulation can provide a greater degree of predictability. Regulation will have a very difficult challenge in responding to the constantly changing character of the Internet. Regulation will therefore create artificial barriers to innovation.

TEF, as the majority of telecom operators, believes that our customers are the centre of our business and therefore disagrees with the statement that indicates that the trend of ISP's is to maximize its profits at the expense of their customers.

It is in the interest of operators to ensure transparency in contractual relationships and communications with clients, clearly defining the service conditions (capacities, functionalities, restrictions, options, quality of service, etc.), and facilitating clients the understanding of their service characteristics in relation to similar offers on the market.

Operators should be able to adjust their Internet access prices to the costs incurred by users and the value perceived by the market, with transparency in the contractual conditions and price schemes.

TEF as an integrated operator of networks and services that invests in broadband infrastructure is interested in new investments by all agents in the Internet value chain and therefore supports an open architecture for Internet. The introduction of Internet regulation could prevent the development of innovative business models and threaten the recovery of the costs incurred in deploying next generation networks, reducing the incentives for investment.

Finally, TEF does not agree with the argument of regulating network management due to the increase in network traffic and believes that the principles of transparency and non discrimination are sufficient, as the multiplication of network traffic will require:

- To manage the network with the most efficient tools and techniques available at each moment, thus guaranteeing in this way the best quality of service to clients.
- To develop new business models in order to increase revenues to compensate for higher traffic costs.

### **C- Regional scenario in Europe**

These issues have been thoroughly debated during the recent process of review of the common European regulatory framework finalized in December 2009. The debate in Europe has differed from that in the United States in terms of timing, focus and intensity of the debate due to the particular features of the European regulatory framework.

European legislation in place since 2002 already featured certain safeguards against any form of discrimination in communications networks (see European Directives on Access

and Universal Service obligations) and imposed customer transparency obligations on communications operators and ISPs.

In one of its Communications in September 2008 the European Commission outlined its concern regarding this issue, due to the social and economic impact of the Internet, and stated its support for a competitive and innovative Internet that fosters customer choice.

The new European Directive on Consumer Rights focuses on strengthening customer choice and the protection of consumer rights. In terms of regulatory intervention, the Directive favors the application of competition law principles – “ex post” intervention – over any “ex ante” intervention or obligation.

The National Regulatory Authorities (NRAs) of each Member State of the European Union are responsible for ensuring that end-users have free access to information and applications as foreseen by art. 8(3)g) of the European Union’s Framework Directive 2002/21/EC. Furthermore, the Directives endow NRAs with the power to control the traffic management procedures used by market players, in order to avoid discriminatory behavior on behalf of these and to ensure the delivery of applications and services within minimum quality standards.

Telefónica agrees with the European Union’s policy stance in terms of not regulating Net Neutrality because it considers that there are sufficient mechanisms in place to counterbalance and address anti-competitive practices and to guarantee consumer rights.

In parallel to the European Union’s initiative, there have been a number of other activities at the national level (i.e. individual European Union Member States) based on general principles aimed at preserving the open nature of the Internet and on self-regulation mechanisms.



With the help of ISPs and ASPs, at the beginning of 2009 the Norwegian regulator (TNP) and the Swedish regulator (PTS) each published guidelines on Net Neutrality which were similar to the FCC's principles, including provisions on transparency and competition aimed at avoiding Net Neutrality regulation. Their policy conclusion is that ex ante regulation should only be considered after an impact assessment that weighs the costs and benefits of this approach has taken place.

In the UK, regulator Ofcom has stated it favors the possibility of exploring self-regulatory options and has, as a first step, published a good practice code aimed at enhancing the transparency and the comparability of fixed broadband offers. Ofcom foresees extending this code to mobile broadband offers.

## **CONCLUSIONS**

Telefónica considers that the debate on Net Neutrality is crucial and therefore believes that the FCC, through this NPRM, can help clarify policy priorities regarding the development of the Internet and foster investment in new accesses, applications and contents. However, Telefónica firmly believes that establishing regulation at the present moment in time could hinder the development of the Internet and hold back innovation and the deployment of new communications infrastructure.

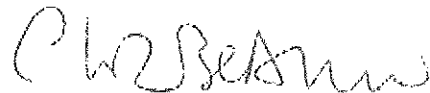
The degree of competition in the Internet access market and of choice that end users enjoy, together with the market's own competitive dynamics, are considered to be more than sufficient to maintain the open nature of the Internet. The growing competition in Internet access through different platforms (wireline or wireless) will further reduce the

risk of anti-competitive behavior and the introduction of regulation could indeed hinder the development of new Internet access platforms.

Internet access providers are constantly seeing the bandwidth requirements of their customers grow due to new applications. The investments required to address these increases in traffic are substantial. Market players need to have the freedom and flexibility to develop new business models that favor innovative services, that allow for a monetization of these increases in traffic and that enable the sustainable development of networks.

The increasing growth and number of players across the Internet value chain risks creating new positions of dominance that might compromise the future of the open Internet, regardless of the activities of Internet access operators. This trend therefore calls for a balanced treatment of market players across the Internet value chain.

Respectfully submitted,



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